STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED May 16, 2006

Plaintiff-Appellee,

 \mathbf{v}

No. 259186 Oakland Circuit Court

LC No. 2004-195016-FC

SHON PATRICK MURPHY,

Defendant-Appellant.

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 25 to 60 years for each first-degree CSC conviction, and 5 to 15 years for each second-degree CSC conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of sexually assaulting his two stepsons, JW, aged 20 at the time of trial, and BW, aged 13 at the time of trial. Defendant and the victims' mother had six children together, and the victims' mother had three children of her own, including the two victims. The charged sexual assaults occurred between 1993 and 1996. At the time of the charged incidents, the family lived on a large farm in Holly. At one point, BW told JW of some things that had occurred between him and defendant. The boys then told their mother that defendant was doing things to them that he should not be doing, without disclosing any specific details. The victims' mother confronted defendant, who allegedly apologized, and promised that it would not happen again. However, the sexual assaults allegedly continued.

In March 2003, the victims' mother filed for divorce from defendant, but dismissed the action after he entered rehabilitation and Alcoholics Anonymous. In May 2003, she again filed for divorce, after defendant allegedly started consuming alcohol again. In June 2003, BW disclosed the sexual assaults to his mother and the police, after learning that two of his younger siblings planned to live with defendant after the divorce. JW ultimately also disclosed defendant's alleged sexual assaults against him.

JW testified that the first incident occurred when he was nine years old, while he and defendant showered together after working on a snowmobile. During the shower, defendant fondled JW's penis and testicles, and then knelt down and "sucked on" his penis and testicles. JW testified that from ages 9 to 12, defendant regularly sexually assaulted him by performing oral sex on him and "dry humping" him, usually waking him during the night. JW explained that his use of the term "dry humping" described defendant's act of rubbing his penis against JW until he ejaculated.

When JW was 12, defendant performed oral sex on him, and then penetrated him anally for the first time. Later that same year, when JW was preparing for a band concert, defendant entered his bedroom, said he was proud of him, removed JW's pants, fondled him, and penetrated him anally. On another occasion, defendant came into the bedroom, pushed JW into a closet, and performed oral sex on him.

JW indicated that, other than the first time he and BW told their mother that defendant was generally acting inappropriately, he did not disclose any other incidents because defendant threatened to harm them, and he was embarrassed. JW explained that he was afraid of defendant because defendant had beaten their sister, and had also struck him and BW with belts and extension cords.

BW testified that his first inappropriate incident with defendant occurred when he was six years old, and defendant called him into his room, put him on the bed, held him down, felt his penis, and dry humped him. BW explained that "dry humping" involved defendant touching him with his erect penis, and moving up and down, while clothed. On another occasion, when BW and defendant were wrestling, defendant pinned him down, and dry humped him. BW recalled that, on a different occasion, when they were watching a scary movie, defendant again held him down and dry humped him. BW indicated that the described sexual incidents occurred 12 to 15 times, occurring "like every couple of months or weeks."

In June 2003, the incidents were disclosed to the police. A state police officer testified that, upon questioning, defendant initially denied that there could have been any inappropriate touching, and claimed that the victims' mother encouraged the false allegations because of their pending divorce.

Subsequently, defendant contacted the officer, requested a meeting, and indicated that he had since recalled some incidents involving BW. Defendant admitted that he may have touched BW inappropriately while in a drunken rage, and admitted to pounding BW's chest and pulling at his shorts, in an effort to teach him a lesson. He indicated that he might have grabbed BW's groin, but asserted that it was not for sexual purposes. Defendant also admitted that there had been some dry humping while in Holly, but declined to discuss the matter.

Defendant's uncle, who had accompanied the victims to the police station, testified that he told defendant that there had been allegations of dry humping. In turn, defendant allegedly told him that he did not want to talk about any incidents that occurred in Holly, that the matter had been "an abomination, but that the Lord had forgive[n] him for that."

The defense denied any wrongdoing, and asserted that the victims' mother encouraged the false allegations to retain custody of their children. The victims' mother denied that she "set this up." The defense presented defense witnesses who testified concerning defendant's character, and denied seeing or hearing about any inappropriate behavior between defendant and the victims.

II. Other Acts Evidence

Defendant first claims that the trial court abused its discretion by admitting under MRE 404(b) evidence of an uncharged sexual act between him and BW. We disagree.

Before trial, the prosecution moved to admit evidence of defendant's other crimes or wrongs under MRE 404(b). The prosecution sought to admit evidence of several uncharged sexual acts between defendant and the victims pursuant to *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973).

Defendant challenges the admission of a 2001 incident that occurred in Standish, when he allegedly touched BW's penis with his hand, and dry humped him. Defendant argued that the 2001 incident was too remote in time, and occurred in a different location than the charged acts, which occurred in Holly. The prosecutor argued, inter alia, that the 2001 act helped to demonstrate a pattern of behavior, and "demonstrated that [the charged] incidents just didn't happen in a vacuum but [were] something that led up to a particular incident and something that carried on after that." The trial court granted the prosecutor's motion, adopting the prosecutor's arguments.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel*, *supra*.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

In *DerMartzex*, *supra* at 414-415, our Supreme Court held that evidence of other sexual acts between a defendant and a child victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. Noting that the credibility of the alleged victim is typically the principal issue in a CSC case, the Court explained that "[l]imiting [the victim's] testimony to the specific act charged and not allowing [the victim] to mention acts leading up to the assault would seriously undermine [the victim's] credibility in the eyes of the jury." *Id.* See also *Sabin* (*After Remand*),

supra at 69-70 ("evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony"). The Court noted, however, that evidence of the uncharged sexual acts would not always be admissible, and could be excluded if the prejudicial effect outweighed the probative value. DerMartzex, supra at 415.

The uncharged sexual act in this case occurred after the charged sexual acts. With respect to *subsequent* uncharged acts, this Court explained in *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989):

We do not believe that the trial court erred by admitting into evidence complainant's testimony regarding subsequent acts of sexual abuse committed by defendant. The rationale behind the [People v Jenness, 5 Mich 305 (1858)] DerMartzex exception is that prior sexual acts between the defendant and the victim are a part of the principal transaction necessary to weigh the victim's testimony regarding the principal transaction. The admission of the subsequentact testimony in this case was consistent with that rationale. In the Jenness and DerMartzex cases, it was the incredibility inherent in a seemingly isolated act of sexual misconduct within a household that prompted the courts to admit the evidence of prior misconduct. The same is true of subsequent acts because they are part of the pattern of abuse. The offense charged need not always be based on the last incident of sexual misconduct. When, as here, it is not, the victim's credibility is still subject to being undermined by the isolated appearance of the charged offense. Although the subsequent acts of sexual abuse occurred away from home, it was the stepfather-stepdaughter relationship that gave defendant the authority and opportunity to take complainant out of the house to avoid discovery. Therefore, the trial court properly applied *DerMartzex* in admitting complainant's testimony concerning the subsequent acts of misconduct. [Citation omitted.]

Here, defendant has not demonstrated that the trial court's evidentiary ruling was an abuse of discretion. The evidence was not offered to show that defendant had a bad character. Rather, it assisted the jury in weighing BW's credibility, particularly where defendant denied any wrongdoing. As in *DerMartzex*, limiting BW's testimony to the four charged isolated acts against him may have seriously undermined BW's credibility in the eyes of the jury. In brief, testimony that defendant sexually assaulted BW in 1995 and 1996 and simply stopped, although BW and defendant continued to live in the same household for several years thereafter, may have seemed incredible without the testimony that the abuse continued, or some other explanation.

Additionally, defendant admitted to the police that, on one occasion, he touched BW's groin area, but claimed that the contact was not done for a sexual purpose, but was related to discipline. The other acts evidence was admissible to rebut any claim that the charged sexual

¹ In *Jenness*, the defendant was charged with sexually assaulting his niece. The trial court admitted evidence of previous acts of intercourse, "not as evidence of substantive offenses, but in explanation and corroboration of the evidence of the act charged in the information." *Id.* at 319.

conduct occurred by "mistake or accident." MRE 404(b)(1). We therefore conclude that the evidence was relevant to the factual issues in this case.

Furthermore, the evidence was not inadmissible simply because the nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr*, *supra* at 499-500. Moreover, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this issue does not warrant reversal.²

III. Right to Present a Defense

Next, defendant argues that the trial court abused its discretion when it precluded a defense witness, David Damron, from testifying about the victims' mother's sole control and discipline of the children to support the defense that she directed them to falsely accuse defendant. We disagree.

In opening statement, defense counsel asserted that the victims' mother encouraged the children to falsely accuse defendant after she filed for divorce, so that he could not obtain custody of his three youngest children. To support this claim, defense counsel asserted that the victims' mother was the sole disciplinarian. During trial, because of a scheduling issue, defendant was permitted to call a defense witness, Damron, out of order, before the prosecutor called the victims' mother. Defendant sought to admit the testimony of Damron, who managed a party store where the victims' mother worked in Holly, to testify regarding his observations of the victims' mother's discipline and control over the victims. During the direct examination of Damron, the following exchange occurred:

- Q. [By defense counsel] I asked her [sic] if you ever saw [defendant] raise his voice, threaten, hit the children and you said no, is that correct?
- A. Correct.

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Q. And I'll ask the same questions about [the victims' mother]. Did you ever see [the victims' mother] raise her voice to the children? [Tr II, p 56.]

² Also, contrary to defendant's suggestion, and as previously indicated, other crimes, wrongs, or acts may be "contemporaneous with, or prior or *subsequent to* the conduct at issue." MRE 404(b)(1) (emphasis added). See also *Dreyer*, *supra*.

The prosecutor objected on relevancy grounds. Defense counsel responded, inter alia, that the testimony was relevant to defendant's defense that the victims' mother "had the hand in this family," "runs these children," they "do what [she] says when she says or else," and that she caused the victims to falsely accuse defendant. In sustaining the prosecutor's objection, the court noted, inter alia, that the issue was a collateral matter, that defendant was on trial, and that the defense had been presented. The court did indicate that defendant could revisit the matter after the victims' mother testified.

We find merit to defendant's claim that the proposed testimony concerning the victims' mother's alleged control and discipline of the victims was relevant to defendant's defense, because it related to the children's motive for making the charges against him. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

But even if the trial court abused its discretion by excluding the evidence, the error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Despite the challenged evidentiary ruling, defendant's defense was presented to the jury, and the fact that the victims' mother disciplined the children was undisputed, and discussed at trial.

During her testimony, the victims' mother did not deny disciplining her children. Further, Damron testified that he never saw defendant yell at, threaten, or strike the children. Also, BW testified that punishment was often physical, and administered by both defendant and his mother. Additionally, defense counsel questioned both victims about their delay in reporting the incidents. In explaining the timing of the charges, both victims discussed the divorce. Under these circumstances, additional evidence that Damron also observed the victims' mother discipline the children would not have affected the outcome.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Id*.

The trial court's ruling was not a blanket exclusion of all evidence questioning the victims' credibility or suggesting that they were encouraged to fabricate the charges against defendant, or otherwise limit defendant's opportunity to present a defense. Although the court precluded the proposed evidence, it allowed Damron to testify that he never saw defendant raise his voice, threaten, or strike the children. Further, defense counsel had the opportunity to cross-examine the victims as well as their mother at length concerning the allegations.

Defendant presented numerous defense witnesses, and plainly presented his defenses. Thus, the jury was aware of defendant's defense. Additionally, defense counsel was apparently satisfied with the testimony garnered from the victims' mother, because he did not request to recall Damron for impeachment purposes after she testified. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Accordingly, reversal is not warranted on this basis.

Affirmed.

/s/ Kathleen Jansen /s/ Janet T. Neff /s/ Brian K. Zahra